



16731
Sept 22 2006

[REDACTED]
[REDACTED]
[REDACTED]
Attn: [REDACTED]

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED]
\$3,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED], which includes your appeal as owner/operator of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$5,000.00 penalty for the following violations:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 CFR 4.05-1 & 5	Failure to give notice as soon as possible of a marine casualty involving any of the occurrences listed in 46 CFR 4.05-1(a)-(f).	\$2,500.00
46 CFR 4.06-60(a)-(d)	Failure to submit required results and/or test results for serious marine incidents or discharge of oil/hazardous materials.	\$2,500.00

The violations are alleged to have occurred on April 9, 2002, when the [REDACTED] experienced a marine casualty while it was underway on the Carolina Beach Inlet between buoys 3 and 4, near Carolina Beach, North Carolina.

On appeal, you deny the violations and contend that the Hearing Officer displayed an "adversarial attitude" and that he failed "to even consider any of the statements made by...[your]...witnesses." You assert that these errors on the part of the Hearing Officer "prevented...[you]...from being able to defend...[your]...position." In addition, you contend that the Hearing Officer incorrectly discounted the statements of your witnesses and, in so doing, accepted all statements contrary to your position "at face value." You further assert, with respect to the notification violation, that the captain of the [REDACTED] was not aware of the severity of the casualty and, as a result, could not have been expected to be aware of the reporting requirement. Finally, with respect to the chemical testing violation, although you do not deny that [REDACTED] did not require chemical testing of the individuals involved with the casualty, you assert that the Hearing Officer failed to consider the fact that the "Captain on the vessel had

a routine drug test within 24 hours of the event...[that]...was clean.” As a result, you ask that the Hearing Officer’s “decision be reversed and that...[your]...record be cleared of all charges.” Your appeal is granted, in part, and denied, in part, for the reasons discussed below.

Before I address the violations, I feel it necessary to discuss the factual occurrences surrounding the incident. The record shows that on April 9, 2002, the [REDACTED], a U.S.-registered passenger vessel, was chartered by Carolina Ocean Studies to take a group of middle school students and their chaperones on an educational boating trip. After the group of approximately 60 children and 17 adults boarded the [REDACTED], the vessel got underway at approximately 1:30 p.m. Sometime shortly thereafter, as the vessel headed eastward in the Carolina Beach Inlet, a rouge wave hit the vessel. When the wave hit the vessel, [REDACTED], one of the chaperones for the trip, was standing on the 2nd deck of the [REDACTED] on the vessel’s port side, directly outside the entrance to the vessel’s wheelhouse. [REDACTED] was thrown into the air when the wave hit the vessel; he landed on his back, sustaining serious injuries to his lower spine. Upon becoming aware of [REDACTED] condition, personnel from the [REDACTED] moved [REDACTED] into the wheelhouse where he could lie down and decided to return to port so that he could receive medical attention. The vessel returned to the pier at approximately 2:30 p.m. After the vessel docked, emergency medical personnel entered the wheelhouse and attended to [REDACTED]. [REDACTED] was able to walk, under his own power, from the wheelhouse to the dock. However, once he was on the dock, he was placed on a stretcher and was taken, via ambulance, to a nearby hospital for further medical attention. Subsequent medical tests revealed that [REDACTED] suffered a “burst fracture” of his lower spine. He remained hospitalized until April 15, 2002.

I will now address the violations beginning with the alleged violation of 46 CFR 4.05-1 & 5. 46 CFR 4.05-1(a) makes clear that “[i]mmediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Marine Safety Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty.” 46 CFR 4.05-1(a)(6) further states, in relevant part, that the term “marine casualty” includes “[a]n injury that requires professional medical treatment (treatment beyond first aid).” The case file shows that, throughout the course of these proceedings, [REDACTED] denied any knowledge of the severity of [REDACTED] injuries. In this regard, in your letter to the Hearing Officer dated April 27, 2004, you stated as follows:

When [REDACTED] first stated that he had pain we summoned an ambulance. However when the EMTs came aboard [the vessel] he refused all but a cursory exam by them. He would not allow them to put him on the stretcher. He insisted on walking off the boat un-aided.

[REDACTED] was still standing on the dock when the vessel left to resume the charter.

Irrespective of [REDACTED] behavior following the incident, the record shows unequivocally that he received professional medical treatment (he was attended by EMTs when the vessel returned to port and he was taken via ambulance to a nearby hospital for treatment) following the incident. He also spent approximately one week as an in-patient. I believe you had sufficient

indication that the injury to [REDACTED] required professional medical treatment. Your vessel returned to port for the specific purpose of obtaining treatment and was met by an ambulance. As a result, pursuant to Coast Guard regulation, the incident meets the definition of the term “marine casualty,” and, as such, was required to be reported to the Coast Guard “immediately” after any resultant safety concerns were addressed. The record shows that you filed a Coast Guard Form 2692, Report of Marine Accident Injury or Death, with the Coast Guard on November 19, 2003, more than one year after the incident occurred. As such, your notification to the Coast Guard of the incident was not “immediate” and I do not find that the Hearing Officer erred in finding the violation proved.

I will next address the alleged violation of 46 CFR 4.06-60(a)-(d). The Coast Guard Enforcement Activity Summary contained within the record shows that the violation resulted from the fact that [REDACTED] failed to conduct post casualty chemical testing following the incident. Pursuant to 46 CFR 4.06-1(b) “[w]hen a marine employer¹ determines that a casualty is, or is likely to become, a serious marine incident, the marine employer shall take all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use.” Under the applicable regulations, the term “individual directly involved in a serious marine incident” means “an individual whose order, action or failure to act is determined to be, or cannot be ruled out as, a causative factor in the events leading to or causing a serious marine incident.” *See* 46 CFR 4.03-4. In addition, 46 CFR 4.06-60(a) requires that “[w]henever an individual engaged or employed on a vessel is identified as being directly involved in a serious marine incident, the marine employer shall complete Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident,” and file the form, including the names of the persons undergoing chemical testing, with the appropriate Coast Guard office. Pursuant to Coast Guard regulation, the term “serious marine incident” includes, in relevant part, “[a]n injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid.” In this case, the record shows both that [REDACTED] sustained an injury that required professional medical treatment beyond first aid and that [REDACTED] did not require the chemical testing of any of its employees after the incident.

On appeal, although you do not deny that [REDACTED] failed to require chemical testing of its employees following the incident, you assert that the vessel’s master, [REDACTED], underwent a urine drug screen the day after the incident. You have provided an itemized statement from the company that conducts drug testing for [REDACTED] to support your assertion in this regard and you contend that the Hearing Officer erred in assessing a penalty for the violation based on this evidence. I do not find your assertions in this regard to be persuasive. First, the record shows that [REDACTED] did not require chemical testing of any of its employees after the incident. As such, the record supports the Hearing Officer’s conclusion that the violation occurred. Next, I note that even if I accepted your assertion that, through coincidence, the vessel’s master underwent a urine drug test the day after the incident, I would not find that the test met the requirements of 46 CFR 4.06, because the test was not for the presence of both alcohol and drugs as the regulation requires, but, rather, [REDACTED]’s urine was only

¹ Under 46 CFR 4.03-45, the term “marine employer” means “the owner, managing operator, charterer, agent, master, or person in charge of a vessel.”

subjected to a drug screen. Accordingly, I do not find that the Hearing Officer erred in finding the violation proved.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer's determination that the violations occurred and that [REDACTED] is the responsible party. Although the Hearing Officer's decision was neither arbitrary nor capricious, given the small business status of [REDACTED], its record of no prior violations, and the circumstances surrounding the incident, I will further mitigate the assessed penalty to \$1,500.00 per violation. Therefore, I find a \$3,000.00 penalty, rather than the \$5,000.00 penalty assessed by the Hearing Officer or \$30,500.00 maximum permitted by statute to be appropriate in light of the circumstances of the case.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$3,000.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 100160
Atlanta, GA 30384

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 4.0% accrues from the date of this letter if payment is not received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

//s//

DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center